

An appeal hearing was held on June 29, 2011 and July 11, 2011 (“Appeal Hearing”). The Applicant appeared in person and with Counsel McKean. As heretofore indicated, two remonstrators appeared with Counsel Metzel and four other individuals who participated in pre-hearing proceedings appeared without counsel. Conrad Cortellini also appeared as a remonstrator and was allowed, as were all remonstrators referred to herein, to participate in the proceedings. On those days, witnesses were sworn, evidence was received, and the matter was taken under advisement. The Hearing Judge, having reviewed the application file, read the typed transcript of

the Local Board Hearing, reviewed the video tape of the Local Board Hearing, considered the evidence submitted during the Appeal Hearing, and having taken official notice of the same as well as the codes, rules, and standards adopted by this state, now tenders his Findings of Fact and Conclusions of Law to the Commission for its consideration.

II. PROCEDURAL HISTORY

1. On September 3, 2010 Applicant filed its transfer application.
2. On December 6, 2010 the Local Board held a hearing and voted three (3) to one (1) to approve the transfer application.
3. On December 6, 2010, the Local Board also held a hearing and voted four (4) to zero (0) to approve the renewal application for Ferguson Holdings, the former holder of the Permit.
4. On December 21, 2010, the parties presented oral argument to the Commission on an issue involving the renewal of the Permit.
5. On January 13, 2011, Applicant submitted a written memorandum on the renewal issue.
6. On January 27, 2011, Remonstrators Rising Property Management and Rick Rising-Moore submitted a written memorandum on the renewal issue.
7. On February 8, 2011, the ATC adopted the Local Board's recommendations, renewed the Permit, transferred the Permit to Applicant, and placed the Permit in escrow.
8. Various Remonstrators timely filed their requests for administrative review, requests for appeal hearing, and petitions for intervention within the fifteen (15) day deadline required by 905 IAC 1-36-2.
9. The Commission held a Pre-Hearing Conference on May 10, 2011 and established various deadlines.
10. The parties filed briefs on the Petitions for Intervention.
11. Commissioner David K. Johnson assumed the role of hearing judge.
12. On June 20, 2011, the Hearing Judge issued rulings on the Petitions for Intervention.
13. On June 29, 2011 and July 11, 2011, the Hearing Judge conducted a hearing regarding the appeal and took the matter under advisement.

III. EVIDENCE BEFORE THE LOCAL BOARD

A. The following individuals testified before the Local Board in favor of the Applicant in this cause:

1. Nicole Oprisu, Working Title, LLC Principal and Operating Manager
2. Michael Rabinowitch, Attorney representing landlord Glendale Partners, Inc. on zoning matters
3. Miguel Santana, Chef for Calle 52
4. Danny Marr, Principal of landlord Glendale Partners, Inc.
5. Mary Owens, Meridian Kessler Neighborhood Association Land Use Chairman

B. The following individuals testified before the Local Board against the Applicant in this cause:

1. James Corman, nearby resident.
2. Paula Light, Meridian Kessler resident.
3. Laura Corman, nearby resident.
4. Clarke Kahlo, Director for Neighbors Helping Neighbors and Meridian Kessler resident
5. Ellen Antoniali, Meridian Kessler resident
6. Andi M. Metzel, Attorney for Rising Property Management and Rick Rising-Moore
7. Rick Rising-Moore, owner of Aristocrat Pub, nearby resident, and commercial property owner.
8. Melissa Uhte, General Manger for Aristocrat Pub
9. Susi Wright, nearby resident.

C. The following evidence was introduced and admitted before the Local Board in favor of the Applicant in this cause:

1. Calle 52 Mission Statement (Exhibit 1)
2. Background of Calle 52 Principals (Exhibit 2)
3. Calle 52 Menus (Exhibit 3)
4. Calle 52 Floor Plan (Exhibit 4)
5. Letters of Support (23) (Exhibit 5)
6. Petitions in Support of Applicant (Exhibit 6)
7. Northside Social Employee Handbook (Exhibit 7)
8. Old Pros Table Rules, Regulations, and Beverage Service Policy (Exhibit 8)
9. It is believed that Exhibits 9 and 10 were omitted from submission.
10. Department of Metropolitan Development Zoning Approval Letter (Exhibit 11)
11. Mac's Convenience Store Findings of Fact and Conclusions of Law (Exhibit 12)

D. The following evidence was introduced and admitted before the Local Board against the Applicant in this cause:

1. Petitions in Opposition (Tab 1)
2. Letters in Opposition to Parking Variance (Tab 2)
3. Indianapolis Fire Department Letter dated October 13, 2010 (Tab 3)
4. Photographs of car accidents (Tab 4)
5. Photograph of Clark Building (Tab 5)
6. Calle 52 Website Statements (Tab 6)
7. Old Pro's Table ATC Information and Incident Reports (Tab 7)
8. Northside Social ATC Information and Incident Reports (Tab 8)
9. Casba ATC Information and Incident Reports (Tab 9)
10. Newspaper Articles re Casba (Tab 10)
11. Letters in Opposition to Zoning Variance (Tab 11)
12. Letter from City County Councilor Joanne Sanders

IV. EVIDENCE BEFORE THE COMMISSION

A. The following individuals testified at the Appeal Hearing before the Commission in favor of the Applicant in this cause:

1. Lt. Tom Black, IMPD North District
2. Officer Mike Martin, IMPD North District
3. Joel Kirsh, patron of Northside Social
4. Michael Rabinowitch, Zoning Attorney for Glendale Partners, Inc.
5. Nicole Oprisu, Working Title, LLC Principal and Operating Manager
6. John Ferguson, Ferguson Holdings, LLC Principal
7. Kathy Shorter, President Harmoni Historic Midtown Initiative
8. Officer Alexander Ray, Indiana State Excise Police

B. The following individuals testified at the Appeal Hearing before the Commission against the Applicant in this cause:

1. Nancy Beals, Drug Free Marion County Program Director
2. James Corman, nearby resident
3. Susi Wright, nearby resident
4. Susan Smith, City Dogs Grocery Owner
5. Conrad Cortellini, Broad Ripple resident
6. Joanne Sanders, City County Councilor
7. Clarke Kahlo, Meridian Kessler resident
8. Carol Frohlich, Meridian Kessler resident
9. Rick Rising-Moore, Aristocrat Pub owner, nearby resident, commercial property owner

C. The following evidence was introduced and admitted at the Appeal Hearing before the Commission in favor of the Applicant in this cause:

1. Police Runs for Northside Social (Exhibit 1)
2. Police Runs for Old Pro's Table (Exhibit 2)
3. Floor Plan Submitted in Zoning Proceedings (Exhibit 3)
4. Photographs of nearby businesses and commercial properties (Exhibit 4)
5. DMD Staff Report for Calle 52 Project (Exhibit 5)
6. Board of Zoning Appeals Findings dated October 19, 2010 (Exhibit 6)
7. Approval Letter from DMD Senior Planner Melanie Mullens (Exhibit 7)
8. Meridian Kessler Variance History Exhibit (Exhibit 8)
9. Affidavit of Terri Lynn Landis (Exhibit 9)
10. ATC Disposition of Ferguson Holdings, LLC Citation (Exhibit 10)
11. Minutes of Commission Meeting on December 21, 2010 (Exhibit 11)
12. McKean Letter to Chairman Massa dated December 22, 2010 (Exhibit 12)
13. ATC Disposition of Ferguson Holdings, LLC Citation (Exhibit 13)
14. McKean Letter to Chairman Massa dated January 13, 2011 (Exhibit 14)
15. Rising Property Management and Rick Rising-Moore Memorandum (Exhibit 15)
16. Minutes of Commission Meeting on February 8, 2011 (Exhibit 16)

17. Affidavit of Mitchell R. Heppenheimer (Exhibit 17)
18. Affidavit of Mark C. Webb (Exhibit 18)
19. Affidavit of Sheri Kelsey (Exhibit 19)
20. Affidavit of Gregory T. Genrich (Exhibit 20)
21. IC 7.1-3-19-11 Regarding Local Board's Recommendation (Exhibit 21)
22. Findings of Fact, Conclusions of Law, and Judgment re Rising Property Management's Verified Petition for Writ of Certiorari and Judicial Review (Exhibit 22)
23. Aerial Photograph of Parking Spaces (Exhibit 23)
24. Melissa Coxey Legal Memorandum dated January 12, 2011
25. Applicant's Video Designation of Marion County Local Board Hearing

D. The following evidence was introduced and admitted at the Appeal Hearing before the Commission against the Applicant in this cause:

1. How Alcohol Outlets Affect Neighborhood Violence Article (Exhibit A)
2. College Avenue Permit Proliferation Map (Exhibit B)
3. Midtown Alcohol Permit Proliferation Map (Exhibit C)
4. Crime Report Summary (1/2 mile radius) (Exhibit D)
5. Data Sets for 46220 Zip Code from DFMC (Exhibit E)
6. Data Sets for 46208 Zip Code from DFMC (Exhibit F)
7. Data Sets for 46205 Zip Code from DFMC (Exhibit G)
8. Public Convenience or Necessity Article (Exhibit H)
9. Alcoholic Beverage Permit Distribution in Marion County from DFMC (2010) (Exhibit I)
10. Crime Report Summary Graph - 52nd and College Avenue (Exhibit J)
11. Crime Report Summary Graph - 827 Broad Ripple Avenue (Exhibit K)
12. Incidents within 1/2 mile of Broad Ripple Avenue (Exhibit L)
13. Zoning Ordinance for C-3 Neighborhood Commercial District (Exhibit M)
14. Zoning Ordinance Construction of Language and Definitions (Exhibit N)
15. Letter from Ferguson to Chairman Massa dated January 10, 2011 (Exhibit O)
16. Offer and Acceptance of Excise Settlement (Exhibit P)
17. Public Access Request from Landis & Landis (Exhibit Q)
18. Photographs of accidents from James Corman (Exhibit R)
19. Letter from Joseph Weidenbener (Exhibit S)
20. Letter from Carol Frohlich (Exhibit T)
21. Video of Marion County Local Board Hearing on December 6, 2010 (Exhibit U)
22. Photographs of City Dog Grocery Parking (Exhibit V)
23. Group Exhibit of Documents submitted by Clarke Kahlo (Exhibit W)
24. Remonstrators Index of Video Segments

V. FINDINGS OF FACT

1. Calle 52, located at 5215 N. College Avenue, Indianapolis, Indiana 47220, is an applicant to receive the transfer of an ATC Type 210 beer, wine, and liquor permit, permit no. RR49-08536.

2. Calle 52 is an Indiana limited liability company, is authorized to do business in the State of Indiana by the Indiana Secretary of State, and is in good standing with the Indiana Secretary of State.

3. Calle 52's application, including the floor plan and other exhibits, meets the requirements of the Commission.

4. The principals for Calle 52 have a good reputation and are held in high esteem in the community.

5. Operating Manager Nicole Oprisu ("Oprisu") is an experienced operator and is knowledgeable about the restaurant industry.

6. Oprisu is knowledgeable about the Indiana alcoholic beverage laws and has a good track record for operating other permit premises in a lawful and responsible manner.

7. Oprisu is a trainer that is certified by the ATC to train alcohol servers in accordance with IC 7.1-3-1.5-4.6 and IC 7.1-3-1.5-4.8.

8. Oprisu is well respected by the law enforcement community in Indianapolis.

9. Oprisu and the other principals of Calle 52 have a high and fine reputation for decency and law obedience.

10. There is nothing to disqualify Oprisu or the other principals of Calle 52 from holding the Permit.

11. Oprisu is a native of Indianapolis and has grown up and lived in the area where Calle 52 will be located.

12. Oprisu has a history of substantial community involvement.

13. Oprisu has received numerous awards for her operation of her other restaurant and drinking establishments.

14. Calle 52 will be a locally owned and independently operated restaurant and Oprisu will spend a significant amount of time on-site as the Operating Manager of the restaurant.

15. Calle 52 will be an upscale restaurant that focuses on dining and food consumption.

16. Calle 52 will provide Pan-Latin Fusion food offerings that will be new and unique in certain respects to the Indianapolis community.

17. Calle 52 will provide an economic benefit to the community by occupying a building that has been vacant for more than two years and generating lease revenues for the landlord.
18. Calle 52 will invest more than \$500,000 in the project to open the restaurant and will create construction jobs for the community.
19. Calle 52 will provide an economic benefit to the community by employing 45-50 people at the restaurant.
20. Calle 52 will expand the tax base and will provide an economic benefit to the community through the payment of sales tax, employment tax, property tax, and food and beverage tax.
21. Calle 52 will benefit the neighborhood and community economically by attracting consumers to the area.
22. The issuance of an alcoholic beverage permit to Calle 52 will have a positive impact on the community.
23. Calle 52 cannot operate under its business model without the approval of a Type 210 alcoholic beverage permit.
24. There are other alcoholic beverage permits located in the close geographical proximity to Calle 52 near the intersection of 52nd Street and College Avenue.
25. Customers of Northside Social, Oprisu's other restaurant, have expressed their desire to Oprisu to seek the services that Calle 52 would provide to the community if an alcoholic beverage permit is issued.
26. More than 600 people signed petitions indicating their support of the alcoholic beverage permit for Calle 52 and expressing a desire for such services at the location.
27. Twenty-three (23) individuals, community leaders, and organizations provided letters of support urging the issuance of the alcoholic beverage permit for Calle 52.
28. Ryan Vaughn, the City County Council President of Indianapolis, Marion County supports the issuance of an alcoholic beverage permit for Calle 52.
29. The Meridian Kessler Neighborhood Association supports the issuance of an alcoholic beverage permit for Calle 52.
30. Harmoni Historic Midtown Initiative supports the issuance of an alcoholic beverage permit for Calle 52.
31. The Indianapolis Chamber of Commerce provided a letter of support for Calle 52.

32. Nearby neighbors, businesses, and property owners have provided letters of support for the issuance of an alcoholic beverage permit for Calle 52 at the proposed location.

33. Kathy Shorter, the President of Harmoni Midtown Initiative, testified that based on the input that Harmoni has received through a process involving 435 individuals from the community who participated in more than thirty (30) separate meetings, the overwhelming majority of the community believes that there is a need and desire in the community for businesses such as Calle 52.

34. Calle 52 will provide twenty-one (21) on site parking spaces.

35. There are approximately 1,200 total public parking spaces available on the streets within a two block radius of Calle 52.

36. The landlord for Calle 52 received approval from the Department of Metropolitan Development Board of Zoning Appeals (“BZA”) for a variance of the required on-site parking spaces.

37. The Department of Metropolitan Development Staff had recommended approval of the parking variance.

38. The Department of Metropolitan Development parking variance process for the Calle 52 site involved public hearings that allowed any remonstrators to participate and voice their concerns regarding parking issues and any potential injurious consequences that might result if the parking variance was granted.

39. Most of the Remonstrators involved in this proceeding also participated as remonstrators in the zoning process and had an opportunity to voice their concerns.

40. Remonstrator Rising Property Management filed a Verified Petition for Writ of Certiorari and Judicial Review of the BZA’s decision to grant the parking variance.

41. Marion Superior Court No. 7 Judge Michael D. Keele issued Judgment denying the Verified Petition for Writ of Certiorari and Judicial Review and upholding the BZA’s grant of the parking variance.

42. The BZA and Judge Keele determined that the parking variance was not injurious to the public health, safety, morals, and general welfare of the community and that the use and value of the area adjacent to the property where Calle 52 will be located will not be affected in a substantially adverse manner.

43. Calle 52 is allowed to have 165 seats in its restaurant pursuant to the zoning determination including no more than 16 seats for outside dining.

44. Calle 52 has discretion as to how to configure its seating within the confines of the zoning determination that allows for 165 total seats including no more than 16 seats for outside dining.

45. The floor plan for Calle 52 is permitted to change until an officer of the Indiana State Excise Police conducts the final inspection of the premise.

46. The proposed permit premise location for Calle 52 is in a commercial node near the intersection of 52nd Street and College Avenue. The building is zoned for commercial use.

47. The IMPD Officers who testified stated that Calle 52 would not present a law enforcement problem for IMPD, the neighborhood, or the community.

48. The IMPD Officers who testified stated that Calle 52 would not create a public safety concern for IMPD, the neighborhood, or the community.

49. At the hearing on December 6, 2010, the Local Board voted three (3) to one (1) to recommend to the Commission that the Permit be transferred to Calle 52 at 5215 N. College Avenue, Indianapolis, Indiana 46220. The transcript of the Local Board hearing on December 6, 2010, and the video tape of the same, clearly demonstrate that the remonstrators were given the opportunity to express their concerns and opposition to this application. In addition, the record demonstrates that the Local Board members understood the concerns expressed and the reason for the opposition to this application. This was demonstrated by the remonstrators at the Local Board hearing and at the appeal hearing before this officer in an organized and professional manner.

50. On February 8, 2011, the Commission approved the transfer of the Permit to Calle 52 and the Permit was placed into escrow pending the final inspection of the premise.

51. In the summer of 2010, Ferguson Holdings was the holder of the Permit and entered into an agreement to sell and transfer the Permit to Working Title, LLC.

52. The Permit had expired on May 18, 2010.

53. Ferguson Holdings filed its renewal application for the Permit on August 26, 2010.

54. On December 6, 2010, the Local Board held a hearing on the renewal application for Ferguson Holdings and voted four (4) to zero (0) to recommend that the Commission approve the renewal application.

55. On December 21, 2010, the Commission heard oral argument on the issue of the renewal and subsequently received legal memoranda from the Applicant and Remonstrators Rising Property Management and Rick Rising-Moore on the renewal issue.

56. On January 12, 2011, ATC Staff Attorney Melissa Coxey provided the Commission with a legal memorandum on the renewal issue.

57. On February 8, 2011, the Commission approved the renewal of the Permit.

58. The decision to grant the renewal of the Permit is consistent with Indiana law, the policies of the Commission, and the past practices of the Commission.

59. Remonstrators Rising Property Management and Rick Rising-Moore are competitors of Calle 52 for the services that it intends to offer.

60. Any finding of fact may be considered a conclusion of law if the context so warrants.

VI. CONCLUSIONS OF LAW

1. The ATC has jurisdiction over this matter pursuant to IC 7.1-1-2-2 and IC 7.1-2-3-9.

2. The permit application was properly submitted pursuant to IC 7.1-3-1-4.

3. The ATC is commissioned to act upon a proper application. IC 7.1-3-1-4.

4. The Commission shall follow the recommendation of a majority of the members of the Local Board to grant the transfer of a retailer permit when the Commission determines that the recommendation is in accordance with the law and supported by substantial evidence. IC 7.1-3-19-11.

5. The Hearing Judge conducted a *de novo* review of the appeal on behalf of the ATC, including a public hearing. 905 IAC 1-36-7(a); IC 7.1-3-19-11.5.

6. The Hearing Judge may consider as evidence all documents in the ATC File, including the transcript of proceedings and exhibits before the Local Board. 905 IAC 1-36-7(a).

7. The Hearing Judge may also consider as evidence any codes, policies, and standards that have been adopted by any agency of this state. 905 IAC 1-36-8(e).

8. Evidence at the Appeal Hearing was received in accordance with the Indiana Administrative Code and the Commission's rules. These Findings are based exclusively upon the substantial and reliable evidence in the record of proceedings and on matters officially noted in the proceeding. 905 IAC 1-37-11(e); IC 4-21.5-3-27(d).

9. Calle 52 is an applicant for an ATC Type 210 beer, wine, and liquor retailer permit.

10. The proposed permit premise is more than two hundred feet (200') from a church or school. IC 7.1-3-21-11.

11. The Commission may issue a Type 210 permit to an applicant who is the proprietor of a restaurant. IC 7.1-3-5-2(a).

12. Calle 52 meets the definition of a restaurant under Indiana alcoholic beverage law. IC 7.1-1-3-40; IC 7.1-3-20-9; 906 IAC 1-20-1.
13. Calle 52 and its principals are fit and proper applicants, have maintained a reputation for decency and law obedience, and are well qualified to hold an alcoholic beverage permit under Indiana law. 950 IAC 1-27-1; IC 7.1-3-19-10.
14. Calle 52 and its principals are of good moral character and good repute in the community in which they live and do business, and are qualified to hold the permit sought. 950 IAC 1-27-1; IC 7.1-3-4-2(a)(2)(A).
15. Calle 52 is not disqualified from holding an ATC Type 210 beer, wine, and liquor restaurant retailer permit. IC 7.1-3-4-2; IC 7.1-3-14-3; IC 7.1-3-9-1.
16. In determining whether to issue a permit, the Commission may consider the geographic desirability of the proposed permit location, the need for the permit at the proposed location, the community's desire for the permit, and the impact of the permit on the community and other businesses. 905 IAC 1-27-4.
17. The Commission may consider both a need and desire for the permit in determining whether a permit should be issued in a particular matter. 905 IAC 1-27-4.
18. "Need" means whether the services are available at the location or in some close geographic proximity. 905 IAC 1-27-4(a).
19. "Desire" means whether individuals would purchase those products at that location, if they were available. 905 IAC 1-27-4(b).
20. A determination of whether there exists a need and desire for the services at the location in question turns on the facts of each case.
21. Where an applicant shows that customers would be willing to purchase alcoholic beverages if they were available for sale, such evidence constitutes a desire to receive such services at that location. 905 IAC 1-27-4(b).
22. The Applicant has proven that there is a need for a Type 210 beer, wine, and liquor restaurant permit at the Applicant's location. 905 IAC 1-27-4(a).
23. The Applicant has proven that the neighborhood and community desire to receive the services of an alcoholic beverage permit at the Applicant's location. 905 IAC 1-27-4(b).
24. The issuance of the Permit to Calle 52 will not negatively impact the community.
25. Calle 52 has submitted substantial evidence that it is qualified to hold an ATC Type 210 beer, wine, and liquor restaurant permit.

26. The Commission acted consistent with Indiana law, the policies of the Commission, and the established custom and practice of the Commission when it approved the renewal of the Permit. *Town of Leo-Cedarville v. Indiana ABC*, 754 N.E.2d 1041, 1049 (Ind. App. 2001); IC 7.1-3-1-3(a); IC 7.1-3-19-1; 905 IAC 1-36-1(b)(3).

27. The Local Board decision to recommend approval of the transfer of the Permit to Calle 52 was in accordance with law and was supported by substantial evidence.

28. The Commission shall follow the recommendation of a majority of the members of the Local Board to grant the transfer of a retailer permit when the Commission determines that the recommendation is in accordance with the law and supported by substantial evidence. IC 7.1-3-19-11.

29. The law is with the Applicant and against the Remonstrators.

Therefore, it is ORDERED, ADJUDGED AND DECREED that the recommendations of the Local Board to approve the renewal and transfer of this Permit to Working Title, LLC d/b/a Calle were in accordance with the law and based on substantial evidence and are supported by the record of the proceedings.

It is hereby further ORDERED, ADJUDGED AND DECREED that the evidence adduced at the Local Board Hearing and the Appeal Hearing was in favor of the Applicant, the appeal of the Intervening Remonstrators is DENIED, and the Permit transfer to Working Title, LLC d/b/a Calle 52 is hereby GRANTED.

DATED: _____

David K. Johnson, Hearing Judge